

**UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD**

SHARAY BALDWIN,  
Appellant,

DOCKET NUMBER  
DE-0752-16-0316-I-2

v.

DEPARTMENT OF THE ARMY,  
Agency.

DATE: June 6, 2023

**THIS FINAL ORDER IS NONPRECEDENTIAL<sup>1</sup>**

Janice L. Jackson, Leavenworth, Kansas, for the appellant.

Eric L. Carter, Esquire, Fort Riley, Kansas, for the agency.

**BEFORE**

Cathy A. Harris, Vice Chairman  
Raymond A. Limon, Member

**FINAL ORDER**

¶1 The appellant has filed a petition for review of the initial decision, which sustained her removal. Generally, we grant petitions such as this one only in the following circumstances: the initial decision contains erroneous findings of material fact; the initial decision is based on an erroneous interpretation of statute or regulation or the erroneous application of the law to the facts of the case; the

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<sup>1</sup> A nonprecedential order is one that the Board has determined does not add significantly to the body of MSPB case law. Parties may cite nonprecedential orders, but such orders have no precedential value; the Board and administrative judges are not required to follow or distinguish them in any future decisions. In contrast, a precedential decision issued as an Opinion and Order has been identified by the Board as significantly contributing to the Board's case law. See [5 C.F.R. § 1201.117\(c\)](#).

administrative judge's rulings during either the course of the appeal or the initial decision were not consistent with required procedures or involved an abuse of discretion, and the resulting error affected the outcome of the case; or new and material evidence or legal argument is available that, despite the petitioner's due diligence, was not available when the record closed. Title 5 of the Code of Federal Regulations, section 1201.115 ([5 C.F.R. § 1201.115](#)). After fully considering the filings in this appeal, we conclude that the petitioner has not established any basis under section 1201.115 for granting the petition for review. Therefore, we DENY the petition for review. Except as expressly MODIFIED to reconsider the appellant's equal employment opportunity (EEO) retaliation claim in light of our recently issued decision in *Pridgen v. Office of Management and Budget*, [2022 MSPB 31](#), we AFFIRM the initial decision.

¶2 Regarding the appellant's EEO retaliation claim, it appears the protected activity in question involved requests for reasonable accommodation and complaints alleging disability discrimination. Refiled Appeal File (RAF), Tab 28 at 7. Thus, under the Rehabilitation Act, the appellant must establish that the protected activity was a "but-for" cause of the employer's action. *Pridgen*, [2022 MSPB 31](#), ¶¶ 46-47.

¶3 This change in the law does not require a different result in this case, however. On review, the appellant asserts that, contrary to the administrative judge's findings below, she engaged in EEO activity as recently January 27, 2016, approximately 3 months before the removal action. Petition for Review File, Tab 1 at 13; RAF, Tab 33, Initial Decision at 18. However, assuming the agency officials involved in the removal action were aware of the appellant's January 27, 2016 complaint, the timing alone is insufficient to establish that the agency would not have removed her but for the protected activity, and the appellant has provided no other evidence to support such a finding. *See Pridgen*, [2022 MSPB 31](#), ¶ 48. Thus, we affirm the administrative judge's finding, as

modified, to find that the appellant did not prove that her protected activity was a “but-for” cause of her removal. *Id.*

¶4 We have considered the appellant’s remaining arguments on review, but find they provide no basis for reversing the initial decision.<sup>2</sup>

### NOTICE OF APPEAL RIGHTS<sup>3</sup>

The initial decision, as supplemented by this Final Order, constitutes the Board’s final decision in this matter. [5 C.F.R. § 1201.113](#). You may obtain review of this final decision. [5 U.S.C. § 7703\(a\)\(1\)](#). By statute, the nature of your claims determines the time limit for seeking such review and the appropriate forum with which to file. [5 U.S.C. § 7703\(b\)](#). Although we offer the following summary of available appeal rights, the Merit Systems Protection Board does not provide legal advice on which option is most appropriate for your situation and the rights described below do not represent a statement of how courts will rule regarding which cases fall within their jurisdiction. If you wish to seek review of this final decision, you should immediately review the law applicable to your claims and carefully follow all filing time limits and requirements. Failure to file

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<sup>2</sup> One of the agency’s charges in support of the removal action is that the appellant failed to follow instructions. Although not argued by the appellant, we note that when she filed this appeal, [5 U.S.C. § 2302\(b\)\(9\)\(D\)](#) made it a prohibited personnel practice to take an action against an employee for “refusing to obey an order that would require the individual to violate a law.” The U.S. Court of Appeals for the Federal Circuit considered this provision and held that “law” only included statutes, and not rules or regulations. *See Rainey v. Merit Systems Protection Board*, [824 F.3d 1359](#), 1364-65 (Fed. Cir. 2016). However, on June 14, 2017, the President signed the Follow the Rules Act into law. Pub. L. No. 115-40, 131 Stat. 861 (2017). The Act amends section 2302(b)(9)(D) to provide whistleblower protection for individuals who refuse to obey an order that would require the violation of a law, rule, or regulation. Nevertheless, the Board has determined that this expansion does not apply retroactively to cases, as here, pending at the time the Act was enacted. *Fisher v. Department of the Interior*, [2023 MSPB 11](#), ¶ 19.

<sup>3</sup> Since the issuance of the initial decision in this matter, the Board may have updated the notice of review rights included in final decisions. As indicated in the notice, the Board cannot advise which option is most appropriate in any matter.

within the applicable time limit may result in the dismissal of your case by your chosen forum.

Please read carefully each of the three main possible choices of review below to decide which one applies to your particular case. If you have questions about whether a particular forum is the appropriate one to review your case, you should contact that forum for more information.

**(1) Judicial review in general.** As a general rule, an appellant seeking judicial review of a final Board order must file a petition for review with the U.S. Court of Appeals for the Federal Circuit, which must be received by the court within **60 calendar days** of the date of issuance of this decision. [5 U.S.C. § 7703\(b\)\(1\)\(A\).](#)

If you submit a petition for review to the U.S. Court of Appeals for the Federal Circuit, you must submit your petition to the court at the following address:

U.S. Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, D.C. 20439

Additional information about the U.S. Court of Appeals for the Federal Circuit is available at the court's website, [www.cafc.uscourts.gov](http://www.cafc.uscourts.gov). Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, 10, and 11.

If you are interested in securing pro bono representation for an appeal to the U.S. Court of Appeals for the Federal Circuit, you may visit our website at <http://www.mspb.gov/probono> for information regarding pro bono representation for Merit Systems Protection Board appellants before the Federal Circuit. The Board neither endorses the services provided by any attorney nor warrants that any attorney will accept representation in a given case.

**(2) Judicial or EEOC review of cases involving a claim of discrimination.** This option applies to you only if you have claimed that you were affected by an action that is appealable to the Board and that such action was based, in whole or in part, on unlawful discrimination. If so, you may obtain judicial review of this decision—including a disposition of your discrimination claims—by filing a civil action with an appropriate U.S. district court (*not* the U.S. Court of Appeals for the Federal Circuit), within **30 calendar days** after you receive this decision. [5 U.S.C. § 7703\(b\)\(2\)](#); *see Perry v. Merit Systems Protection Board*, [582 U.S. 420](#) (2017). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the district court no later than **30 calendar days** after your representative receives this decision. If the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a disabling condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* [42 U.S.C. § 2000e-5\(f\)](#) and [29 U.S.C. § 794a](#).

Contact information for U.S. district courts can be found at their respective websites, which can be accessed through the link below:

[http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx).

Alternatively, you may request review by the Equal Employment Opportunity Commission (EEOC) of your discrimination claims only, excluding all other issues. [5 U.S.C. § 7702\(b\)\(1\)](#). You must file any such request with the EEOC's Office of Federal Operations within **30 calendar days** after you receive this decision. [5 U.S.C. § 7702\(b\)\(1\)](#). If you have a representative in this case, and your representative receives this decision before you do, then you must file with the EEOC no later than **30 calendar days** after your representative receives this decision.

If you submit a request for review to the EEOC by regular U.S. mail, the address of the EEOC is:

Office of Federal Operations  
 Equal Employment Opportunity Commission  
 P.O. Box 77960  
 Washington, D.C. 20013

If you submit a request for review to the EEOC via commercial delivery or by a method requiring a signature, it must be addressed to:

Office of Federal Operations  
 Equal Employment Opportunity Commission  
 131 M Street, N.E.  
 Suite 5SW12G  
 Washington, D.C. 20507

**(3) Judicial review pursuant to the Whistleblower Protection Enhancement Act of 2012.** This option applies to you only if you have raised claims of reprisal for whistleblowing disclosures under [5 U.S.C. § 2302](#)(b)(8) or other protected activities listed in [5 U.S.C. § 2302](#)(b)(9)(A)(i), (B), (C), or (D). If so, and your judicial petition for review “raises no challenge to the Board’s disposition of allegations of a prohibited personnel practice described in section 2302(b) other than practices described in section 2302(b)(8), or 2302(b)(9)(A)(i), (B), (C), or (D),” then you may file a petition for judicial review either with the U.S. Court of Appeals for the Federal Circuit or any court of appeals of competent jurisdiction.<sup>4</sup> The court of appeals must receive your petition for review within **60 days** of the date of issuance of this decision. [5 U.S.C. § 7703](#)(b)(1)(B).

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<sup>4</sup> The original statutory provision that provided for judicial review of certain whistleblower claims by any court of appeals of competent jurisdiction expired on December 27, 2017. The All Circuit Review Act, signed into law by the President on July 7, 2018, permanently allows appellants to file petitions for judicial review of MSPB decisions in certain whistleblower reprisal cases with the U.S. Court of Appeals for the Federal Circuit or any other circuit court of appeals of competent jurisdiction. The All Circuit Review Act is retroactive to November 26, 2017. Pub. L. No. 115-195, 132 Stat. 1510.

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[http://www.uscourts.gov/Court\\_Locator/CourtWebsites.aspx](http://www.uscourts.gov/Court_Locator/CourtWebsites.aspx).

FOR THE BOARD:

Washington, D.C.

/s/ for

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Jennifer Everling  
Acting Clerk of the Board